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CORPORATION FORMED FOR BENEFIT OF FAMILY AND DESCENDANTS, NOT FOR CHARITABLE PURPOSE.

Gerard Beekman, by his last will and testament, gave all his residuary estate, amounting to nearly $1,000,000, to the Beekman Family Association, a corporation organized under the laws of the state of New York, "to have and to hold to the said association, its successors and assigns forever."

The corporation having accepted the bequest, the Surrogate made an order imposing a tax upon the transfer under the provisions of the New York tax law. The association claimed that it was a charitable corporation, and as such, exempt from such tax.

The purposes of the corporation were stated in its articles of incorporation, as follows: 1. To pay the expense of preparatory, collegiate and professional education or other suitable education for such members of the Beekman family as may be designated and approved by at least five directors of the corporation.

2. To furnish pecuniary aid, exclusive of loans, to such poor and needy members of the Beekman family as may be designated and approved by at least five directors of the corporation.

3. To receive and hold, collect and preserve family portraits and heirlooms of the Beekman family, and matter connected with the history of that family, and documents and books relating to the family, with power to add to and publish the same, and to designate and maintain a place of deposit for receiving, holding, collecting, preserving and exhibiting these portraits, heirlooms and matter connected with the history of the family, and documents and books as an undivided collection.

4. To care for and maintain, improve and embellish such burial lots or places in cemeteries, including the walks, fences, monuments, structures and tombs thereon, in which are interred members of the Beekman family as shall be designated and approved by at least five directors of the corporation, provided that at least one such burial lot or place shall always be cared for, maintained, improved and embellished by the corporation.

5. To support, maintain and educate a person or persons other than a member of the Beekman family, and to contribute towards the maintenance of educational institutions otherwise than for the education of members of the Beekman family, and to contribute to charitable and benevolent uses and to religious purposes, as from time to time the Board of Directors shall deem proper and desirable; provided, however, that no such action as specified in this section 5 shall be taken unless expressly authorized by the by-laws of the corporation, and then only by the concurring vote of all and at least seven directors.

Third. All lineal descendants of William Beekman, who became, in 1747, a resident of New Amsterdam, now New York City, shall be eligible to membership in the corporation if approved by a concurring vote of not less than five directors. All such lineal descendants and the wives and widows of any of them shall be included in the term, "The Beekman Family" wherever used in this instrument.

The question finally reached the Court of Appeals under the title of In the Matter of the Estate of Beekman, and was decided December 6, last (not yet reported); the Court holding that the bequest was subject to the tax.

The Court of Appeals lays down the rule that if one or more of the purposes for which the gift may be used is not charitable or benevolent, the corporation is not a charitable corporation and the gift not a charitable gift. The principal of such holding

is that the portion of a trust that might otherwise be construed as charitable cannot be sustained, because the trustees have an election to apply the funds to purposes not technically charitable.

Referring to provision 5 of the purposes of the corporation, the Court of Appeals held that such a purpose is not a charity, and a corporation formed with this as one of its objects ceases to be a charitable corporation. The Articles of Incorporation provided that at least one burial lot or place shall always be cared for, but within the discretion of five directors, any number of such lots or places may be cared for, embellished or maintained. The amount of corporate funds which might be expended for such purposes was unlimited. Such a discretion, as well as such a purpose, was declared by the Court to destroy all elements which might otherwise make the Beekman Family Association a charitable corporation.

A charitable trust or a charity is a donation in trust for promoting the welfare of mankind at large, or of a community, or of some class forming a part of it, indefinite as to numbers and individuals.

In England there was a difference of opinion upon the question whether the maintenance and repair of the tomb or monument of the donor, and keeping his grave beautified and in good order constituted a good charitable use. Down to the time of the American Revolution the rule appears to have followed that of the civil law; that it was, but according to later English cases, it is not. It is now well settled that in the absence of statute, a bequest for the perpetual care, improvement or embellishment of a tomb, monument or burial lot of the testator, his family, relatives or other individuals named is not a bequest for a charitable purpose, and is void as a perpetuity. A gift for the maintenance of a private burial lot or monument possesses none of the elements of a charitable use. It is not a gift to any public purpose. In the object for which the interest on the money is to be expended, the public have no concern. There is not the requisite vagueness and indefiniteness as to the number of persons to be benefited. Such a trust is not rendered valid by a direction that any surplus shall be applied to the general maintenance of the cemetery. B.

NOTES OF IMPORTANT DECISIONS.

DEPOT TRUCKMAN ENGAGED IN INTERSTATE COMMERCE.—A railroad depot truckman, while assisting in moving a crated planing mill, which was on defendant railroad company's platform and was in the way of other truckmen who desired to load a car, having been placed there by another road for transportation to a point outside the state, was held, in Maher v. St. Louis & S. F. R. Co., Mo. App., 234 S. W. 1034, to be engaged in interstate commerce and within the provisions of the Federal Employers' Liability Act. The Court, in regard to this question, said:

"Without going into the multitude of cases of the federal courts on this matter, and particularly those of the United States Supreme Court, we think it sufficient to refer to that of Shanks v. Delaware, Lackawanna & Western R. Co., 239 U. S. 556, especially to that part of it commencing at page 559, 36 Sup. Ct. 188, 60 L. Ed. 436, L. R. A. 1916C, 797, on which counsel for both parties rely. Applying the tests which were there used to determine what is interstate commerce, the Supreme Court of the United States has given many instances, and we think that this one at bar comes within the rule there announced, although no case just like the one before us is presented. This machine was, in fact, at the time and place, a part of an interstate commerce shipment, temporarily halted at St. Louis on its way to its ultimate destination in another state. But it was as much a part of that transportation as if on the train in actual transit. It had been deposited on the platform of the defendant by another road, for the purpose of transportation by the defendant to a point outside of this state. The fact that it was standing at the time on the platform can make no difference. It was as much on its way as an interstate shipment as if actually in the car, or about to be put in the car for interstate shipment. We can take no other view of it, under the decisions of the Supreme Court of the United States and of our own state, than that this machine at the time constituted a part of interstate commerce and that plaintiff was injured while engaged either directly in interstate transportation, or, certainly, in work 'so closely related to it as to be practically a part of it,' and that is said in Shanks v. Delaware, Lackawanna & Western R. Co., supra, to be the test. So we hold that the evidence in the case shows that plaintiff 'was at the time of

the injury engaged in interstate transportation, or in work so closely related to it as to be practically a part of it'."

LOSS OF EYE BY ONE-EYED EMPLOYEE COMPENSABLE AS PARTIAL DISABILITY ONLY.—A workman with only one eye, receiving an injury which resulted in the loss of that eye, was held, in Stevens v. Marion Machine, etc., Co., Ind. App., 133 N. E. 23, not to be entitled to compensation under the Indiana Workmen's Compensation Act for total disability, but only for the "permanent loss of the sight of one eye," though the loss of his eye resulted in total blindness. Said the Court:

"Counsel for the appellant contend that on the facts of this case the workman is entitled to compensation under section 29, which provides generally that, where the injury causes total disability, compensation shall be paid during the period of total disability, not to exceed, however, 500 weeks. The contention rests on the proposition that, the workman having permanently lost the sight of one eye in the days of his youth, it necessarily follows that the permanent loss of the sight of his other eye, by the industrial accident, resulted in permanent total disability for work. The contention cannot be sustained. The compensation plan is a legislative venture; and, of course, those who are intrusted with the administration of it can do nothing other than ascertain and execute the legislative intent. The rule is fundamental that in the construction and application of a statute specific provisions take priority over general provisions.

"The concluding sentence of section 31, following the schedule of specific injuries, declares: 'In all other cases of * * * partial disability * * * compensation in lieu of all other compensation shall be paid when and in the amount determined by the Industrial Board, etc.'

"That language indicates unmistakingly that the legislature regarded the several injuries mentioned in the schedule as injuries which of themselves naturally result in partial disability only, and would not result in total disability in the absence of complications. In the case at bar the injury resulted in 'the permanent and irrecoverable loss of the sight of one eye,' and nothing more. It is inaccurate to say that the injury resulted in total blindness. The industrial injury plus the injury received in childhood resulted in total blindness. Evidently the legislature acted on the basis that normally a man has two eyes, either one of which is capable of supplying some light to the body, and that the loss of one constitutes a partial impairment only. This interpretation is supported by the fact that this feature of the statute has been amended to provide compensation for 500 weeks where the loss of the sight of both eyes results from the same accident. Evidently the legislature did not intend that an industry should be chargeable on account of an injury to an eye which occurred long before the workman came to that industry."

The Court of Errors and Appeals of New Jersey, in Combination Rubber Mfg. Co. v. Court of Common Pleas, 115 Atl. 138, took just the opposite view, holding that an award for total and permanent disability was justified since the loss of the remaining eye rendered the workman totally blind. See also In re Branconniers (Mass.), 111 N. E. 792.

THE DECLARATORY JUDGMENT.

The story is told of a certain fatuous old gentleman, who gave a huge sum of money for the building of a wonderful hospital, near a particularly dangerous cliff. Immediately at the base of the cliff, luxurious ambulances were constantly kept in waiting and whenever some unhappy wayfarer chanced to fall, the attendants gathered up what remained of the unfortunate and rushed him to the hospital, for the best treatment science could provide. It never occurred to the well-meaning old philanthropist, that a railing about the top of the cliff would have served his purpose. Also, alas, that it would have been much simpler and without the ancillary discomfitures resultant upon the patient's personal demonstration of the unfailing accuracy of Newton's law of gravitation.

This attempt at amelioration is so ludicrously unsatisfying, that the story is always told jocularly. Yet this time it must lose its facetious character and be told with pathos, when the realization reaches us, that the systems of procedure under which the great majority of our states, and of particular interest to us, Kansas, practice are founded on a very similar premise. The Rule seemingly is, that one must fall from the cliff in order to get aid. We are old-fashioned doctors who have not yet adopted prophylaxis.

In the earlier stages of our civilization, man looked solely to his own welfare, and his only methods of protection were physical strength, and mental alertness. Man is a social animal. Groups were formed, and in time men came to have a realization of a social structure. For the protection

of this social structure courts of justice were evolved.

The strength of the mass was not merely realized. It had to be demonstrated. In order for the courts of justice to function in those days, it was necessary to use force. But it is a truism that as civilization advances, more and more does the undisplayed strength of society become recognized. Today it is but a chivalet on our part to imagine that when a court declares that certain facts are true, or orders certain things to be done, compulsion will be necessary to enforce that declaration, or order. As Sunderland well expresses it: "We have not allowed our developing civilization to produce any effect upon our judicial functions."

Our methods of relief are based upon a social system which considered force and justice inseparable. It knows none but wrongdoers. It is a development of the early English law which did not recognize the distinction between a crime and a civil wrong, and which will not correct a wrong without making as part of its decree, some punishment of the defendant.

The courts will not function unless someone has committed a violation of another's Right, Privilege, Power or Immunity, or at least has threatened a violation. As Salmond says: "Justice is administered only against wrong-doers in act or intent."

What are our requisites to a cause of action? Pomeroy, whose analysis of remedial right has been generally accepted by our courts, says, "Every remedial right rises out of an antecedent primary right, and corresponding duty, and a delict or breach of such primary right, and corresponding duty, by the person on whom the duty rests. Every judicial action must therefore involve the following elements: First a primary right possessed by the plaintiff, and a corresponding primary duty devolving upon the defendant; Second, a delict or wrong done by the defendant which consisted in a breach of such primary right, and duty; Third, a remedial right arising from this delict, and finally the remedy or relief itself. Every action however complicated, or however simple, must contain these essential elements."

Sustaining this view of Pomeroy's, the supreme court of Maryland has decided that the decree of a court of equity and not its opinion is the instrument through which relief is granted, and that the court will not take jurisdiction unless it can give immediate relief. Speaking of mere opinion, the same court says that although such opinion may be sound and clear as an abstract proposition, yet, if no decree can follow to make it effective, it is wholly valueless and nugatory. Similarly a New Jersey court informs the litigants that it will not express opinions for the mere information of the parties.

It is a fact so well recognized as hardly to be worthy of mention, that in order to be recognized by the judicial tribunals of this country, the defendant must have committed some wrong, and the plaintiff must be entitled to and seeking executory relief. Neither of these elements would be necessary in an action before the English courts, nor before the courts of a great deal of the civilized world, those favored spots where the declaratory judgment is recognized.

Why is it necessary that the court continually bare its teeth? Why is not our social structure threatened as much by uncertainty and question in regard to a person's Rights, Powers, Privileges, and Immunities, as by a breach of those relationships? Does not an order become unnecessary when a declaration will perform all its functions? Would not a judicial declaration that a statute is invalid prove as effectual as an injunction to restrain its enforcement? Could any harm result to a defendant if a plaintiff, apprehensive of attack, had a declaration made that defendant had no right? Our system of preventative relief is practically a nullity; we must turn with avidity therefore to examine with great care the declaratory judgment known

to the English and other legal systems constantly employed in England, Scotland, Ireland, India, Ontario, British Columbia, Australia, New Zealand, Germany and Austria. In its study we find an answer to the above questions.

Because of the limited field of reference this article is necessarily indebted to the pioneers in the study of this subject, Edwin M. Borchard, and Edson R. Sunderland, whose respective articles aroused general interest in the United States in this most important procedural reform.

We must examine the declaratory judgment from several arbitrary points of view in order to thoroughly cover its intricacies. First, as to its intentions, powers, and the varieties which compose it; Second, its history; Third, its present status in the various countries where it has been adopted; Fourth, its status in the United States; Fifth, what there is of the declaratory judgment in Kansas, and Sixth, a resume of the types of cases which have found relief in the various countries of the globe through the declaratory judgment.

Taking these various subjects up in order we come first to the intentions, powers, and varieties of such proposed remedy.

The declaratory judgment is intended to increase the equalization of our social system. To get around the well recognized rule of the courts that legal injuries should precede recourse to their remedies. Its purpose is to exchange security and stability for doubt and uncertainty. It does not presuppose a wrong on the part of the defendant, but where legal relations have been threatened or placed in uncertainty, the courts may determine finally those relations. Declaratory judgments proper simply define a jural relation, and declare it existent. They serve as sage advice to a person to whom obligations are due or who is under them. It is not designed to enable people to "sleep o' nights," as is expressed by a great English jurist, but is intended to lessen reasons for litigation.

The court will declare in its discretion when it believes its purpose will be practical, if parties will be kept from going astray, or future litigation aborted. The judgment operates as res adjudicata and binds the parties and their privies within the same limitations as attach to other final judgments. The great point of difference is that they cannot be executed, and a new action must be founded on the old declaration, in order for execution to issue. This seeming fault, however, is purely academic. It is rarely necessary to resort to a request for execution, for, as has been pointed out, the latent force of society is generally sufficient to support a declaration of one of its courts.

Negative forms of declaratory judgments; that is, requests for declarations of privilege or immunity, cannot be followed by a demand for coercive relief. The declaration alone is to all purposes sufficient. Should it happen, nevertheless, that after a declaration had been given, the defendant bring an action, he could be met by a plea of res judicata. The old declaratory judgment could only be reopened and impeached in the same manner as executory judgments.

In one variety of declaration, coercive relief can be had with the declaration of desired. In the other, coercive relief is not available, the defendant having committed no wrong. In the first class, an ordinary executory action would be placed in this country.

The question therefore arises, how the advantage of the declaratory judgment, if executory relief is available. The answer to this question is three fold. In the first place the declaration may stand, and prove of value where the coercive relief will fail. Secondly, the procedure is very much simplified. As a general rule, a question is prepared for the cognizance of the court, after this fashion. "Was an assignment against X void as against his assignee in bankruptcy?" Or that in respect to land in question, "Were defendants entitled to a right of re-entry?" These questions can gen-

erally be answered by a simple yes or no. Finally, as Professor Sunderland has pointed out, there is the psychological effect of the declaratory as compared with executory action.

Under the declaratory action, every suit becomes a friendly suit. It cannot be doubted that in the United States, many people do not like to enter a court because they realize that an action in a court presupposes a recalcitrant defendant, who has committed a wrong against the plaintiff, and on whom the plaintiff is declaring a legal war. Parties shrink from the courts not wishing to declare war on their neighbors. Here then is a hiatus in the continuity of that which we pride ourselves on providing for the righting of wrongs.

The declaratory action presupposes that both parties have done no wrong, that each wishes to do right and act honestly. To ask a court if you have certain rights is much more tactful than to demand damages, or an injunction. The same result is achieved with much less friction. It is almost unnecessary to say that if given the choice, people will take an amicable rather than a non-amicable method of settling disputes.

This final advantage alone is sufficient to recommend the declaratory judgment to the procedure of any State.

Declaratory judgments are either affirmative or negative. By the affirmative declaratory judgment, I mean those wherein the plaintiff claims he has a right to do something, or demand something done by the defendant. As a rule, coercive relief could be asked in the affirmative type of judgment, and it often happens that along with the request for a declaration there is a separate prayer for coercive relief.

In the negative type of declaration, the plaintiff asks that he be declared not obliged to do certain acts; that the defendant not be permitted to require their performance. They establish privilege and immunity in tht plaintiff, no right and disability in the defendant. Negative declaratory actions have been recognized in England only since the celebrated case of Guarantee Trust Co. v. Hannay,[1] which construed Rule XXV, order 5, of the Supreme Court to include such actions.

The declaratory action, as well as most of our present day law finds its origin in the old Roman law. In 246 B. C. we find the first Plebeian Pontifex Maximus announcing that he will give legal advice to all who desire it. Of course these opinions had not the binding force of a judicial decision, but no one ever questioned them. Again where certain questions of fact were to be decided the praetor would on the request of one of the parties submit the facts to a judex for decision The response was a declaration from the judex. The common form of a judgment in Rome was an ordinary executory judgment. The dignity of such judgments, however, was denied the pronouncement of the judex, which were known as "pronuntiatio." These were so helpful as to become increasingly popular. They were widely used, and finally became known as actiones prejudiciales.

These actions were limited in scope. On the whole, their work consisted in the declaration of status, such as the amount of a wife's dowry, the relationship between master and slave, and at times the validity of legal instruments was passed upon.

The year 1495 is generally accepted as the date Roman law became recognized in Europe. The declaratory judgment as it existed at that time was limited to questions of status, and property rights connected therewith; and the validity or invalidity of wills and other written instruments. As it exists today there are practically no limits to its usefulness. Its form is in general sufficient to satisfy most any specific question. The negative declaratory judgment developed in the Roman civil law of the Middle ages, especially in Italy. The people of Medieval Italy were sensitive to the dangers of insecurity.

The declaratory judgment was known to practically every country in Europe during

(1) (1915 C. A.), 1-536.

the Middle ages. Some have allowed this form of relief to atrophy, however. France has no general statute authorizing the declaratory judgment. The action of the Middle Ages has fallen into disuse. It was from the France of the fourteenth and fifteenth centuries, however, that the action of declarator was carried into Scotland, and through which it finally reached England.

Germany adopted the declaratory judgment in its widest application both affirmative and negative in 1877. This was later incorporated in the revised code of 1898, section 256 of which reads: "An action may be brought for the declaration of the existence of a legal relation, or for the declaration of the genuineness or spuriousness of the instrument, provided the plaintiff has a legal interest in having the legal relation or the genuineness or spuriousness of the instrument determined by judicial decision The same code also provides for judicial declarations as to the relationship of defendants to a deceased person under accident insurance laws; the determination of preference among creditors, under bankruptcy laws; and for the determination of conflicts under patent design and trademark privileges.

The German courts have generally construed legal interest as meaning that some Right, Privilege, Power, or Immunity will be lost or endangered by the courts failing to make a declaration. Failure to dispute the contention of the plaintiff by the defendant has been held to constitute lack of interest. The German courts have held that if the plaintiff is entitled to coercive relief, he may not choose to take a declaration, but must take as they say, the best remedy open to him.

Strange to say only about five per cent of the cases coming before the supreme courts of Germany are for declaratory relief. The decision, mentioned above, of the court which decided that a declaration could not replace coercive relief has had a restraining influence on the use of this action. As the decision has since been overruled, we may expect to see a growth in the percentage of cases, which ask for declarations, in the future.

The laws of Spain and the Spanish South America know the declaratory judgment, at least in its negative form. This may be discerned upon reading article 1976 of the Civil Code of Bolivia, which finds a counterpart in the codes of most other South American states and in Spain. It allows a party to require an opponent to bring an action or keep silent, where the opponent has boasted or asserted matters which cause the person asking the declaration to lose good reputation or honor. In article 191 of the same code it is provided that "when a person who must go on a journey by land or sea asserts that another is waiting the moment of departure to bring some action against him, he may ask that the latter be compelled to bring the action immediately.

The connecting link between the declaratory action of the middle ages and modern English law, is found in the Scotch action of declarator. It is true that no modern law or statute in Scotland expressly authorizes its use, yet it has been so long a part and important part of the Scotch law, that even its source is lost. Cases disclose the use of declarator as early as 1541. As to its characteristics Erskine says: "A declaratory action is that in which some right which is actually violated or threatened is craved to be declared in favor of the pursuer, but nothing sought to be paid or performed by the defender. Decrees upon actions that are properly declarator confer no new right, they only declare what was the pursuer's right before." The words of Lord Stair describe how very broad the action is: "There is no right but is capable of declarator."

The declarator included both negative and affirmative forms of action. The subjects of declarations include status, personal and real property rights, and the construction of written deeds, trusts and other instruments. The Scotch courts have ex-

ceeded the English in liberality, especially in a greater latitude toward granting declarations of fact.

The right to grant declaration as elsewhere is discretionary with the court. The plaintiff must show a substantial interest in the declaration, and the jural relation which he is asserting must be in dispute. The declaration of rights to be enjoyed in the future must serve some useful purpose in settling doubtful legal relations. If the declaration cannot constitute res judicata it will not be made. This last rule of jurisdiction has had a tendency to change in the last few years, and the tendency seems toward granting declarations, even when founded on purely contingent future interests.

In England Lord Brougham first began an agitation for a declaratory action in 1828. That year, in a speech before the House of Commons upon the defects in the administration of justice by the courts of chancery, he pointed out the fact that in England the judicial declaration of a right or title might not be obtained whereas such relief had existed for years in Scotland. By this date the rules of equity were nearly as hard and fast as were the rules of Common Law, at least they were not flexible enough to compass such a reform as Lord Brougham desired. Its ability to absorb novel remedies was limited to dreams of its youth. Statute alone therefore could provide the remedy .

Brougham received quite a following among the great justices and law scholars of that period. Jeremy Bentham showed his awareness, even before this time, of the necessity for such action as shown by his writings on the preinterpretative function of the Judiciary. Several of the great English law lords, whose names are talismanic, at about this time, spoke their approbation of the Scotch Declarator in glowing terms. In 1852 the first definite step was taken, in the passage of the chancery procedure act, section 50 of which provided that, "No suit in said court shall be open to objection on the ground that merely a declaratory decree or order is sought thereby, and it shall be lawful for the court to make binding declarations of rights, without getting consequential relief."

The section apparently provided for an action similar to the Scotch declarator. Such, however, was not the construction of the courts. Three restrictions were placed on the use of the action. One limited its application to cases where consequential relief might have been asked, but was not. Two, the relief could only be had in chancery courts. Three, the courts would not give findings as to the enjoyment of rights in the future or as to future contingencies.

This unsatisfying situation persisted through that marvelous era accompanying the Judicature Act of 1873, which might be called the Rennaissance of the English legal system, and lasted until 1883. In that year among the superior court rules was Order XXV, Rule 5, which reads as follows: "No action or proceeding shall be open to objection on the ground that a mere declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed or not." In 1893 this rule was supplemented by one through which the court was given the power of construing written instruments, including wills, deeds, and contracts, for the purpose of declaring the rights of the interested parties. Even after the passage of these rules, it was not until 1915 that the great case of Guarantee Trust Co. v. Hannay,[2] found that the above rules applied to negative as well as affirmative forms of action.

The English order XXV, rule 5, has proven so very successful, efficient and inexpensive that it has been adopted practically verbatim by the codes of procedure or rules of court of Australia, New Zealand, Queensland, Victoria, and other Australian states, Ontario, British Columbia,

(2) 2 C. A. (1915), 536.

Manitoba, the other Canadian provinces, India and Ceylon.

Today in England the majority of cases that come before the court of chancery are declaratory in nature.

In the United States under the equity jurisdiction of our courts to entertain bills Quia Timet; grant injunctions, decree cancellations of instruments, etc., we are continually getting semi-declaration of rights. Under some of our codes these powers are broadened. In but four of the states, however, have the legislatures passed acts providing for pure declaratory judgments.

New Jersey passed a law in 1915, authorizing the application to a court of equity of any person claiming a right under a written instrument, for a declaration of the rights of the persons interested. Although this act is confined to but one type of declaratory judgment, its usefulness has been proven by the number of times it has been resorted to since its passage.

The year 1919 was prolific in declaratory laws. Michigan, Florida, and Wisconsin passed laws in that year. The Michigan act which is more comprehensive than those of Florida and Wisconsin accomplishes the same results as the English rules. It allows for a declaration in law or in equity of rights of parties or their rights under written instruments. The issue may be submitted to the jury in the form of interrogatories. Upon an order to show cause further relief may be given, application having been made by petition. The act is declared to be remedial and is to be liberally construed, and administered with a view to making the courts more serviceable to the people.

Since this article was first written, the Michigan Supreme Court, in the case of Anway v. Grand Rapids Ry.,[3] has declared the Michigan Declaratory Judgment invalid on the ground that it is repugnant to the clause of the state constitution providing for separation of powers.

The temper of the court seems to have had some weight in deciding this particular question, as is apparent from this statement of the court's: "Before this court, with its membership of eight, takes up the work of advising 3,000,000 people, it is well that this court pause long enough to consider . . . whether the act calls upon us to perform any duties prescribed by the Constitution." Probably fear of overwork was of some bearing in the court's seeking the first opportunity presented to declare the act unconstitutional.

The reasoning of the court seems based upon two premises, one of which, progressive jurisprudence, has passed, the second which does not apply to declaratory judgments. The first is that the courts refuse to act where coercive relief cannot be given, that such an act would not be judicial, and that it would therefore be repugnant to the Constitution. The second proposition is that the declaratory judgment partakes of all the objectionable features of a moot trial, which courts of justice will not countenance.

Although at common law the courts would not act where coercive relief could not be given, courts of equity have done so, once they have acquired jurisdiction, for centuries, and the Michigan Court would be but extending a well recognized principle of Judicial duty by taking cognizance of declaratory judgments.

The second proposition that declaratory judgments are moot decisions, or partake of their objectionable features, reflects upon the care with which the Michigan Court has studied the purposes of the Michigan Act which is based upon the English Acts. Declaratory judgments are decisions of existing controversies. They are binding on the parties and are res adjudicata. None of these characteristics may be claimed by moot decisions, which are not binding upon the court or upon the parties.

The case of Anway v. Grand Rapids Ry. Co., seems to be bad law, as its reasoning is based upon premises essentially unsound. It is hoped that other states will not be de-

(3) 179 N. W. 350.

terred in this tremendously necessary progressive legislation by such an unfortunate decision.

The Florida act authorizes the equity courts to render declarations in regard to the construction of written instruments, or in regard to the rights of persons interested, whether other relief is or could be claimed or not. The supreme court is authorized to prescribe rules to carry the act into effect.

The Wisconsin act also limits the relief to courts of equity, providing that where it appears that substantial doubt exists as to the rights and duties of the parties, and that it appears that public or private interests will be materially promoted by a declaration in advance of an actual or threatened invasion, actions to obtain declaratory relief may be brought. The action to be final and conclusive as to the rights and duties involved.

Today there seems to be an agitation in favor of declaratory acts. There has recently been before Congress a bill to authorize the federal courts to use declaratory judgments. This bill provided that on written request the federal courts be permitted to declare rights and other legal relations, whether or not further relief is or could be claimed or not, such declaration to have the force of a binding judgment.

The California Bar Association at its meeting in October, 1919, recommended the passage of a declaratory act in accordance with the ideas of Mr. Maurice E. Harrison, later ably set forth in the California Law Review for March 1920. The Connecticut Bar Association also meeting in 1919, approved the adoption of a statute giving declaratory powers to the superior courts, the proposed form assimilating that of the bill before Congress applying to the federal courts.

The fact that we have unconsciously been resorting to those equitable remedies which are in part declaratory, even though it has been in desultory fashion proves our need for the declaratory judgment.

Just how much the various equitable remedies partake of the nature of declarations is a mooted question. Pomeroy, although he has at times declared that the rules which define the capacity or incapacity of persons to acquire rights or be subject to duties are purely legal says: "In a suit to construe a will, estates in specific property are directly established. In suits to quiet title the very object of the judgment is to declare or establish the plaintiff's legal or equitable estate in some specific property. Even in suits to remove cloud from title, although the relief is often obtained by means of cancellation, yet from the nature of the whole proceeding the plaintiff's estate is thereby established, and he is left in its full enjoyment."[3a]

Seven of our states: Massachusetts, New Hampshire, Maine, Rhode Island, Florida, Colorado, and South Dakota, authorize advisory opinions to persons of fiduciary character. These opinions have, however nothing like the efficacy of a declaratory judgment, in that they are in no sense binding.

Of the many equitable remedies partaking of the nature of declarations, by far the most commonly resorted to are Bills to quiet title, and bills for the construction of wills and deeds. Most states have statutory provisions in regard to quieting title; these on the whole apply solely to real property, however. Connecticut alone allowing for the determining of all adverse claims whether real or personal. Under most of the statutes possession is made one of the prerequisites to the bringing of the action, a restriction which greatly limits its worth.

In those nine states where the plan of registration known as the Torrens system has been adopted (Illinois, Ohio, California, Mass., Ore., Minn., Colorado, Washington, and New York), much greater liberality is given to the action to quiet title. Under this system anyone having an interest in land, may by application in writing, have their title registered. The court, after

(3a) Pomeroy's Equity Jurisprudence, § 1378.

determining the truth of the facts set forth issues a summons to all other parties or persons unknown claiming an interest in the land. The case is tried as any civil action, and the court has the power to confirm or deny the title claimed by the plaintiff. If affirmed, the title is registered.

Pomeroy comments upon the restrictions surrounding access to the equitable power of construing wills and deeds as follows: "The general view is that the suit can only be maintained by some party directly interested in the trust under the will that is by an executor or trustee or by a cestui or legatee. It cannot be maintained by an heir at law or devisee of a mere legal title, and much less by a creditor. Illinois and several other states, however, allow for the construction of a will by anyone interested thereunder.

The type of cases which have been decided under the rules giving the English, Scotch and German courts, the power to grant declarations have been of every imaginable state of facts. Division into sundry group heads, however, is possible. Several of these groups represent states of fact which have not as yet been recognized by the courts as capable of declaratory relief, but which undoubtedly will be in the near future. The following seven fold division has seemed the most practical.

(1) declarations of fact; (2) declarations as to future interests; (3) declarations of status; (4) the construction of written instruments; (5) declarations as to the title of property; (6) declarations as to obligations which are not contractual. This is the true declaratory judgment which determines a Right, Privilege, Power, or Immunity in the plaintiff, or a no right, duty, liability, or disability in the defendant.

Declarations of Facts—The general rule today is that the court will not grant declarations of fact, although the decisions seem turning toward the theory that as long as the establishment of a legal relation depends on the establishment of a fact, the one should be granted as well as the other. The Scotch courts have proven much more liberal in granting declarations of fact than have either the English or German.[4]

Declarations as to Future Interests—It is often very desirable to know the court's decision, on a state of facts which have not yet arisen. Reversioners and remainderman are good examples of people in those circumstances. The present rule seems to grant this relief with qualifications. It is well expressed by Jessel M. R. in Curtis v. Sheffield.[5] "Now it is true that it is not the practice of the courts of chancery, and was not the practice, to decide as to future rights, but to wait until the event has happened, unless a present right depends upon the decision or there are some other special circumstances to satisfy the court that it is desirable at once to decide on future rights. But where all the parties who in any event will be entitled to the property are of age and are ready to argue the case, the reason of the rule departs and it becomes a bare technicality; the reason of the rule is this, that the court will not decide on future rights, because until the event happens it does not know who may be interested in arguing the question, and therefore may be shutting out parties who are entitled to succeed."

The German courts allow declarations as to future interests, and this seems the desirable goal of all the courts.[6]

Declarations of Status—Declarations of status are perhaps the earliest known function of declaratory jurisprudence. The question comes up most often in determining the legitimacy or validity of marriage. Such declarations should not be confused with divorce which creates an entirely new

(4) Pro.: In re Wilkinson's Estate (1917), Ch. 620. In re Price (1900), Ch. 442; Nichols v. Nichols (1899 Ch.), 81 L. T. 81; Hope v. Edinburgh Corp. (1897), 5 S. L. T. 195. Contra.: German cases; Gifford v. Trail (1829), 7 Shaw 854.

(5) 1882 C. A. 31, Ch. Div. 134.

(6) Contra.: Bell v. Code (1861), 2 J. & H. 122; Lady Longdale v. Briggs (1856), 8 De G. M. & G. 391; Bright v. Tyndale (1876), 4 Ch. D. 189. Pro.: Curtis v. Sheffield (1882), 21 Ch. D. 1.

status. Often the question in the construction of deeds and wills is one of status, this being one of the most commonly resorted to declaratory actions. Decisions in this group have varied from a declaration that the plaintiff be declared a natural born citizen, to one that the plaintiffs are not members of a certain society.[7]

Construction of Written Instruments—Hostile litigation could hardly prove more efficacious than preventative relief through the construction of written instruments. This particular class of declarations is probably the most widely used and helpful of all. The equity practice as to the construction of wills and deeds is long drawn out and expensive. Under the declaratory system the decision is obtained with little expense and comparative ease. The most important questions coming up under this class are the construction of wills; questions arising under deeds and mortgages, on bills of sale, and under the by-laws and articles of association of corporations. Many cases have been decided under each of these questions.

Coming under the same classification but of sufficient importance to warrant individual discussion, is the court's power to construe contracts. It often happens that two men will interpret the same clause very differently; as Bentham says, "No two men see the facts the same."[8] By acting on their own interpretation of the clause the parties invite a law suit. It is true that in practice in this country we generally rush to our lawyers for advice, but in that case we are simply wagering upon our lawyer's interpretation. Arbitration clauses have become very common in our contracts, and although their effect is beneficial, they lack something of the certainty of a judgment. By a declaration the parties are enabled to obtain authoritatively, judicial interpretations of their jural relations under a written contract.

A wide variety of cases have been decided under this power of the courts, and many interesting decisions have been reached. This mode of relief was inestimable in value during the war when parties to contract were being confronted with circumstances particularly difficult of interpretation.

Declarations As to Title of Property—Practically the only method used in England today, for the trial of title to property is the declaratory judgment. This includes both real and personal property. Although we have in Kansas a statutory action to try title, supplemented by equitable relief, yet the English system is far superior in the ease and simplicity with which the relief may be had, and has the added advantage that declaratory actions are always friendly suits.[9]

Declarations of Jural Relations—It can readily be seen that when a court declares the jural relations of parties, it is also declaring on almost any imaginable state of facts. These various examples will illustrate the heterogeneous character of this group.

A party who claims a right necessarily prays a duty in his opponent; this right

(7) West v. Lord Sackville (1903), 2 Ch. 378; Edmonds v. Edmonds (N. S., 1903), 24 S. C. R. 440; Simms v. Lilleshal Coal Co. (C. A., 1917), 2 K. B. 368; German (1882), 8 R. G. 3.

(8) In re Harrison (1918 Ch.), weekly notes, Mar. 30, 1918; In re Wooley (1918), 1 Ch. 33; In re Kennedy (1917), 1 Ch. 9; In re Palmer (1916), 2 Ch. 91; Cyclist Club v. Hopkinson, 101 L. T. R. 848 (Ch. Div. 1909); In re Walmsley and Shaw Contract, 1917, 1 Ch. 93; Hopkinson v. Mortimer Harley & Co., Ltd. 1917), 1 Ch. 646; In re Gibbons 1919), 2 Ch. 99; In re Fraser & Chamers, Ltd., 1919, 2 Ch. 114; In re Baroness Zouch (1919), 2 Ch. 178; Pauts Coolings Syndicate, Ltd. v. Etherington (1919), 2 Ch. 254; Lair v. Chartered Institute of Patent Agents (1919), 2 Ch. 276; Johnson v. Sargant & Sons, 1 K. B. (1918), 101; Gascoigne v. Gascoigne, 1 K. B. (1918), 228.

(9) Gooderham v. Toronto (189), 121 Ont. Rep. 120. Aukerson v. Connelly (1906), 2 Ch. 544; Re Dornley's Estate (1870), 3 Irish L. J. Misc., 345; Champion and White v. City of Vancouver (1916), 23 Br. Col. 221; Thronhill v. Weeks (1913), 1 Ch. 438; Davidson v. Davidson (1906), Scottish Law Times, 337; British Actors Film Co. v. Glover. 1 K. B. (1918), 299.

may be the recovery of money, or the widely different right and privilege of entering a public building. An example of a declaration of power, would be that a vested remainderman has the ability to alienate his interest, and so on through the various jural relations of Liability, Disability, Immunity, and No Right.[10]

The fact that the declaratory judgment has been so widely used even in preference to other forms of relief is a great argument for its adoption. To this add the fact that it has great capacity for correcting pathological conditions in the dispensing of justice; that this form of relief does away with legal warfare. Few more additions would be necessary to construct the framework of an ideal remedy.

Except through its medium many questions worthy of decision could not be brought to the notice of the court. It is of tremendous worth in making certain and stable our jural relations, a necessary function of the courts which our own law has seen fit to ignore.

Because its procedure is simple, and its use practicable; Because, without the declaratory judgment, we are denying ourselves the cure of an important deficiency in our legal system, which has been latently irritating our methods of jurisprudence; Because the Declaratory Judgment has in many parts of the world proven capable of curing the same deficiencies which I have pointed out in our system, the *Declaratory Judgment* should be incorporated in the Kansas code.

PHILIP L. LEVI.

Kansas City, Mo.

10) Powell v. Jones (1905), 1 K. B. 11; Atty. Gen. v. Scott (1904 K. B.), 20 T. L. R. 630; Morton et al v. Smith (1864), 3 M. 29; Corp. of Bristoe v. Sinnah (1917), 2 Ch. 340; Ry. Co. v. Meek (1849), 12 D. 153; German (44 R. G. 183), 1899-(1913), 82 R. G. 170; Steam Navigation Co., Ltd. v. Maclay (1918), 1 K. B. 33; Marconi's Wireless Telegraph Co. v. Rex (C. A. 1918), 1 K. B. 193; Williams v. North's Navigation Collieries H. L., 1916, A. C. 136.

AUTOMOBILES—RIGHT OF WAY AS TO TURNING CAR.

HOLMAN v. IVINS

Supreme Court of Minnesota. Nov. 10, 1921.

Subdivision 2 of § 2552, Gen. St. 1913, as amended and as found in 1917 Supplement, § 2552, subd. 2, to Gen. St. 1913, requiring a driver of a vehicle approaching or crossing a street intersection to yield the hight-of-way to any other vehicle approaching from his right, is applicable where a driver attempts to cross the street along which he is driving to enter a cross street, which does not continue on the other side of the first-mentioned street.

HOLT J. Summit avenue runs east and west, and has a 55-foot driveway for some distance on both sides of where Mackubin street enters it from the north. The latter street goes no further south than to Summit. Plaintiff was driving his automobile westerly on Summit avenue, approaching Mackubin street, when defendant driving easterly on that avenue was nearing the same street. The latter turned to go north upon Mackubin street; but the right front spring of plaintiff's car caught in the right rear wheel of defendant's, and both vehicles were considerably damaged. Plaintiff sued to recover the damages resulting to him from the collision, and defendant answered, denying responsibility and counterclaiming for the damages he sustained. Plaintiff recovered. Defendant appeals from the order denying a new trial.

The only error assigned questions the propriety of submitting for the jury's consideration the statute reading:

"The driver of any vehicle approaching or crossing a street or highway intersection shall give the right-of-way to any other vehicle approaching from his right on the intersecting street or highway, and shall have the right-of-way at such crossing over any vehicle approaching from his left on such intersecting street or highway." Section 2552, G. S. 1913, as amended by the addition of subdivision 2 in section 22, c. 119, Laws 1917 (Gen. St. Supp. 1917, § 2552).

The claim of defendant is that the statute does not apply, because Mackubin street ends at Summit avenue, and does not continue on to the south. At places where two streets cross, there is a space common to both, on which space the traveler must yield the right-of-way to any one approaching on his right. So we think there is a space in common to both streets where one street opens into another only on one side. The space to the north of the center line of Summit avenue

and within the east and west line of Mackubin street extended is such a space. As soon as defendant turned towards this space plaintiff was approaching to defendant's right, and the latter's duty was to yield the right-of-way. Again plaintiff, traveling on Summit avenue westerly, and on the north half thereof, was bound to give the right of way to one driving south on Mackubin street into Summit avenue. There is an intersection, at least, as to the northerly half of the space in common there would have been, had Mackubin street continued to the south. We are of the opinion that the north half of Summit avenue must be held to be intersected by Mackubin street, and thence the statute quoted was properly applied. Indeed, the situation calls for the observance of the rule of the statute even more urgently than where both streets pass on beyond.

The fact that there is a statute (§ 2634 G. S. 1913) requiring vehicles in turning into an intersecting street, or in making a turn at an intersection to keep to the right of the center thereof, does not suspend the operation of the right-of-way statute while the turn is made. In turning the driver of the vehicle must heed the requirements of both statutes mentioned, as well as the one found in § 2635, G. S. 1913, relating to the speed in turning a corner. They are not contradictory, and may all be applicable in a given case.

The order is affirmed.

NOTE—*Right-of-Way at Highway Intersections —Application of Law to Turning Vehicle.*—A statute requiring automobile driver to grant the right-of-way at the street intersection to an automobile approaching from his right does not apply where the driver to the left turns to his right into intersecting street as near the right-hand boundary of the road as possible, as required by such statute, since in such case he does not interfere with the driver approaching the intersection from his right, and who, in approaching the intersection, should be driving on the right-hand side of the street. Mills v. Dakota Co., S. D., 184 N. W. 261.

ITEM OF PROFESSIONAL INTEREST

BAR ASSOCIATION MEETINGS FOR 1922—WHEN AND WHERE TO BE HELD.

American—San Francisco, August.
Alabama—April 28 and 29, probably Decatur.
Florida—Orlando, June 15 and 16.
Iowa—Sioux City, June 22 and 23.
Virginia—Lynchburg, June 6, 7 and 8.
Wyoming—Laramie, June 15 and 16.

HUMOR OF THE LAW

A certain wealthy and able lawyer, whose beginnings were small, was employed by the goverment in some important cases. It was while he was in Chicago on one of these cases that he sat at a table in a restaurant with two young lawyers, who recognized him.

The young men were talking about college days. Finally one turned and asked rather patronizingly:

"By the way, sir, what was your school?"

"Haven't any," growled the lawyer. "I practice law by ear." — *American Legion Weekly.*

John J. Beatty, clerk of the Johnson circuit court, has had many novel experiences with persons wishing to obtain marriage licenses, states the *Public Ledger* but a letter he has received from an Indianapolis man proves to be the first of its kind to come to him since he has been clerk. The letter, dated September 3, reads:

"I am sending you the money to renew my marriage license for me. Look at your records of July 2, 1915, or 1916, or 1917, if you please. If this is not enough, I will send you more. Let me know by return mail."

It takes all kinds of persons to make a world. Sometimes they are said to come to town for the purpose of paying the interest on their Liberty bonds.—*Case and Comment.*

A correspondent who has recently returned from Florida writes that he witnessed this amusing incident on the train. A huge, red-faced conductor asked a little, dried-up passenger for his ticket. The little man couldn't find it and at last the conductor said: "Now look-aheah, you've just got one of three things to do. You can pay your fare, produce your ticket, or get off the train."

Just then the embarrassed little man found the missing pasteboard. Presenting it to his florid opponent, he grinned, threw back his shoulders, and said, mockingly: "Now look-a-heah, you've got just one of three things to do. You can exercise more, eat less, or bust." —*Boston Transcript.*

"The proof of the pudding is in the eating," said the man who believes in the old maxims.

"Yes," agreed the one who makes up new ones as he goes along, "and the higher the proof the better the eating."

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this Digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Arbitration and Award**—Required Oath.—Under Code Civ. Proc. § 532, providing that, in pleading a judgment or other determination of a court or officer of special jurisdiction, it is not necessary to state the facts conferring jurisdiction, but that the judgment or determination may be stated to have been duly given or made, in an action on an award made in a common-law arbitration, an allegation that the arbitrators duly made their award in writing is a sufficient allegation that they took the required oath, since "duly" means according to law, and implies a compliance therewith in both form and substance.—Cohen Iron Work Co. v. Jaffe, N. Y., 190 N. Y. S. 476.

2. **Attorney and Client**—Collection Agency.—An attorney who, in addition to the practice of his profession, conducts a collection agency from his office, the purpose of the agency being to furnish subscribers with books containing letters for use by merchants to aid collection from delinquent customers, the matter in the forms tending to secure collection of bills by misrepresentation that an inquiry has been made regarding the debtor's financial standing, when in fact no request has been made, and misrepresentation as to a person presumed to be in his employ, violates the sound rules of legal ethics, but, on account of his conduct when the matters were called to his attention by the Bar Association, the punishment is limited to a censure.—In re Thayer, N. Y., 190 N. Y. S. 392.

3. **Bankruptcy**—Claim by Relative.—A relative of a bankrupt has a perfect right to loan the bankrupt money, and, having done so, may file a claim in the bankrupt's estate and participate in the dividends properly allowed.—In re McClelland, U. S. D. C., 275 Fed. 577.

4.——Computing Creditors. — Small current debts, contracted to be paid monthly or on demand, and which have been previously so paid, such as claims for rent, groceries, drugs, club dues, etc., cannot be resorted to by an insolvent for the purpose of increasing the number of his creditors to 12 or more, to defeat an involuntary petition by a large creditor.—In re Branche, U. S. D. C., 275 Fed. 555.

5.—Jurisdiction of Referee.—A referee who, without notice to the bankrupt, ordered money set apart as his homestead exemption, delivered to one claiming to be the receiver of a state court, held to have jurisdiction to vacate such order and to require restitution of the money.—In re Dunaway, U. S. D. C., 275 Fed. 591.

6.——Proof of Claim.—A proof of claim and power of attorney may be contained in the same instrument, but in that case it must meet all requirements of Bankruptcy Act, § 57, and of General Order No. 21, and the person executing it, if by a partnership, must make oath that he is a member of the partnership, and if by a corporation, that he is an officer and duly authorized to execute it, and in either case the jurat of the officer before whom the oath is taken must show that deponent is known to him or his identity established by satisfactory proof.—In re Saslaw, U. S. D. C., 275 Fed. 587.

7.——Resolution of Corporation.—In the absence of fraud or collusion, a resolution passed by the directors of a corporation, admitting its inability to pay its debts and asking that it be adjudged a bankrupt, is sufficient to warrant an adjudication and the question of its solvency is immaterial.—In re Mohawk Weaving Mills, U. S. D. C., 275 Fed. 589.

8. **Banks and Banking**—Cashier's Authority.—In the absence of evidence to the contrary, it will be assumed that the authority to make loans and permit overdrafts is vested in the board of directors of a bank, and that the cashier is vested with only so much authority in that respect as the board may confer on him or knowingly permit him to exercise.—Bank of Jeanerette v. Druilhet, La., 89 So. 674.

9. **Bastards**—Inheritance.—Civ. Code, art. 203, permits the mother alone in a proper case to acknowledge her illegitimate child without regard to the father's action, for even his acknowledgment under article 918 et seq. does not give the right of inheritance from the mother who has not acknowledged; yet, if the father has not acknowledged and the mother has, it may inherit from her.—Minor v. Young, La., 89 So. 757.

10. **Brokers** — Commission. — Where partners selling lands on commission contracted with third person to pay him one-fifth the commission obtained from defendant on account of sales of real estate, and instructed defendant to pay such sum to the third person, and defendant so paid same under instructions received from its agent, the partners are in no position to repudiate such payment, whether or not there in fact existed a legal obligation on their part to pay such third person.—Payne & Tippin v. W. E. Stewart Land Co., Tex., 234 S. W. 254.

11. **Carriers of Goods**—Notice of Arrival.—Section 5 of the conditions contained in such Uniform Bill of Lading, properly construed, gives the owner 48 hours after notice by the carrier of the arrival of the goods, within which to remove the goods before the liability of the carrier as such ceases and its liability as warehouseman begins.—Del Signore v. Payne, W. Va., 109 S. E. 232.

12. **Carriers of Passengers**—Degree of Care.—The owner of a passenger elevator that is installed in his building for the use of tenants and the public is bound to use the same degree of care with respect to those using the elevator that is imposed upon common carriers.—Dailey v. Sovereign Camp, W. O. W., Neb., 184 N. W. 920.

13.——Liability.—A receiver of a railroad company, who runs his own trains, over a railroad owned by another, in charge of his own servants, carrying a passenger whom he had contfor injury to the passenger by a wreck caused by negligence of his servants who prepared the cars for use or operated the train, merely betracted to carry, is not relieved from liability cause another company owned the roadbed, and that a contract with such owner bound him to account "as agent," for what was earned by operation of its part of the railroad.—Heed v. Gummere, Ind., 132 N. E. 637.

14.——Loss of Baggage.—Aside from schedules of rates provided for in G. L. 5281, a carrier was bound by the act of an agent in knowingly accepting trunks containing merchandise for transportation as baggage and placing them in the waiting room for the night with the expressed intent of checking them in the morning, such goods being burned during the night.

—Simpson v. Central Vermont Ry. Co., Vt., 115 Atl. 299.

15.——Overcrowding.—It is not negligence for a carrier to permit a passenger to ride on a crowded car if he chooses to do so.—Carton v. Eyres & Seattle Drayage Co., Wash., 201 Pac. 737.

16.——Relation of Passengers.—Under section 4867, Code of 1906, it is the duty of railroads to heat and light their passenger waiting rooms for 30 minutes after the arrival of trains for use of disembarking passengers, and where a passenger intends using the room, but does not because it is not heated and lighted, and goes away, but returns, the relation of passenger does not, for this reason, cease during the statutory 30 minutes.—Davis v. Day, Miss., 89 So. 814.

17. **Chattel Mortgages**—Subsequent Creditor. —For the conversion of a Case engine, plaintiffs bring this action and recover a judgment for $400 and costs. The plaintiffs claim under a chattel mortgage. Defendant claims under an attachment which was levied prior to the filing of the mortgage. The attachment was for a debt which existed prior to the execution of the mortgage. Hence the lumber company is not a subsequent creditor in good faith and its claim does not take precedence over the mortgage.—Moen v. Kilzer Lumber Co., N. D., 184 N. W. 989.

18. **Constitutional Law**—Due Process.—Assessment of street railroad's property on March 15th held not to deny to the railroad, or city by whom property was subsequently purchased, the equal protection of the law, or deprive them of property without due process of law, in contravention of Const. U. S. Amend. 14, though the company had not, prior to assessment, filed report concerning its business, property, capital, and stock under Acts 1907, c. 78, § 5; the filing of such statement being directory and not mandatory upon the public authorities, in view of section 7 and Acts 1917, c. 54.—Puget Sound Power & Light Co. v. City of Seattle, Wash., 201 Pac. 449.

19. **Corporations**—Doing Business in State.—Where the secretary and treasurer of a foreign corporation lives in this state for his own convenience, and there is no proof that the corporation ever transacted any business in this state, such residence does not bring the corporation here, so as to make valid service of a summons on him.—Hulick v. Parent Petroleum Corporation, N. Y., 190 N. Y. S. 377.

20.——Method of Determining Quorum.—Where master was appointed to hold a meeting in pursuance of a stockholder's petition to compel the corporation to elect directors, and at such meeting some 250 of those present left because of riot and disorder, it was error for the master in determining whether a quorum was present at the beginning to compute such 250 persons as holding 2,500 shares or more, because the stock issued averaged 11 shares per stockholder in the corporation, such method being mere speculation.—In re Gulla, Del., 115 Atl. 317.

21.——Powers.—A corporation must dwell in state in which created, and though it may do business wherever its charter permits, provided the right is not denied by the local law, the powers and limitations of its charter are the same in other states in which it does business as in the state of its creation.—Boyette v. Preston Motors Corporation, Ala., 89 So. 746.

22.——Service of Process.—Under 28 Del. Laws, c. 102, § 5, requiring as to service of process on a corporation's resident agent, that, if the latter be a corporation the service may be made on its secretary, service on the assistant secretary is not sufficient.—Liberty Brand Canning Co. v. American Stores Co., Del., 115 Atl. 193.

23.——Wrongful Appropriation of Profits.—An action against trustees of a corporation to compel a restoration of profits claimed to have been wrongfully appropriated to their use, brought by a volunteer stockholder after refusal of the corporation to bring it, is in legal effect a suit by the corporation, though under the control of the volunteer plaintiff.—Eriksson v. Boyum, Minn., 184 N. W. 961.

24. **Criminal Law**—Poison in Food.—Where defendant placed strychnine in a coffee pot containing coffee grounds with intent to injure the person who would drink the second making of coffee from such grounds, he was guilty of the offense defined by Vernon's Ann. Pen. Code 1916, art. 1077; any article used as food or drink by man, whether simple, mixed, or compound, including food adjuncts, such as condiments, spices, etc., being "food," and article 699 defining food as used in the pure food laws, as including all articles used for food, drink, confectionery, or condiments by man.—Harkey v. State, Tex., 234 S. W. 221.

25. **Divorce**—Share in Real Estate.—Where a divorce decree gave defendant the privilege of purchasing plaintiff's share in real estate mentioned for a specific sum, but did not fix the time for so doing, payment was to be made and the deed delivered immediately, or within a reasonable time, and, failing to do so, the privilege should be canceled.—Lee v. Lee, Minn., 184 N. W. 954.

26. **Electricity**—Cutting Tree.—The mere fact that the defendant might have allowed his line of telephone wire to touch the limb of a tree cannot be taken to have as a natural and probable consequence that some other person would fell a tree across the properly strung line of electric wires stretched six feet above the telephone wire, so as to bring the two lines in contact, and by such a concurrence of events complete a short circuit, or that such intervening agency could have been reasonably foreseen or anticipated by the defendant.—Gillespie v. Andrews, Ga., 108 S. E. 906.

27. **Eminent Domain**—Compensation for Land. —Where surviving husband continued in possession of wife's land and conveyed a strip thereof to railroad for right-of-way, children who were adults when land was appropriated by the railroad were precluded by limitations from suing railroad for compensation under Crawford & Moses' Dig. § 3930, more than seven years thereafter.—Missouri & N. A. R. Co. v. Chapman, Ark., 234 S. W. 171.

28.——Sewerage Plant.—Under the Home Rule Act, a municipality cannot maintain proceedings to acquire land for a sewerage disposal plant in another municipality without the consent of the governing body of that municipality and its board of health, or in case of their refusal, without the reversal of such refusal by the State Department of Health, and it is immaterial, the object is to acquire a plant already completed, instead of the land on which to construct one.—North Jersey U. & S. Disposal Plant v. Van Buskirk, N. J., 115 Atl. 215.

29. **Fish**—Escallops Are "Fish."—Escallops are fish within the regulations of the State Fisheries Commission Board and of the statute creating it.—State v. Dudley, N. C., 109 S. E. 63.

30. **Fixtures**—Tank Sunk in Earth.—Where plaintiff by written agreement leased a tank to be used on the land of lessee, the transaction was a bailment, and setting it in the ground and covering it with earth, as between plaintiff and the lessee, did not cause it to become real estate.—Standard Oil Co. of New York v. Dolgin, Vt., 115 Atl. 235.

31. **Fraud**—Representations.—Statements in pamphlet published by a stock powder company, presenting the merits of the stock powder in the treatment of hog diseases held representations of fact, not mere expressions of opinion or dealer's talk.—Economy Hog & Cattle Powder Co. v. Compton, Ind., 132 N. E. 642.

32. **Highways**—War Conditions.—Acts 1919, c. 93, releasing highway contractors by reason of increased cost occasioned by the war, cannot be upheld under the police power on reasons of public safety, public health, public morals, or public welfare.—Davis Const. Co. v. Board of Com'rs of Boone County Ind., 132 N. E. 629.

33. **Husband and Wife**—Abandonment.—Where the husband abandons the wife, and she institutes suit for maintenance and support, and to justify his abandonment and non-

support he charges adultery and cruel and inhuman treatment on the part of the wife, and the evidence is conflicting, contradictory, and unsatisfactory, and the lower court on such evidence has found that the charges have not been sustained, the appellate court will refuse to reverse, although it might have rendered a different decree if it had acted thereon in the first instance.—Vickers v. Vickers, W. Va., 109 S. E. 234.

34.——Professional Services for Wife.—Where a physician or surgeon renders necessary professional services for a wife, with her consent, the husband is primarily liable therefor, even in the absence of any express consent on his own part. The charge of the court, that if the operation was performed "wholly without any authority from this defendant, then the plaintiff would not be entitled to recover a fee for such operation," was more favorable to the defendant than the rule required.—Fincher v. Davis, Ga., 108 S. E. 905.

35.——Wife's Services.—Under Rev. St. c. 66, § 3, authorizing married women to receive the wages of their labor, sue therefor in their own names, and hold them in their own right against the husband or any other person, a charge for the labor of a married woman cannot be recovered in an action by the husband.—Pike v. Smith, Me., 115 Atl. 283.

36. **Injunction**—Trade Secret.—Employees of one having a trade secret, who are under an express contract or a contract implied from their confidential relationship to their employer not to disclose such secret will be enjoined from divulging the same to the injury of their employer, whether before or after they have left his employ.—Cameron Mach. Co. v. Samuel M. Langston, N. J., 115 Atl. 212.

37.——When Granted.—Injunction will not issue when the thing to be enjoined has been done and cannot be undone, though complainant has a perfect ground of complaint.—Jones v. Maxwell Motor Co., Del., 115 Atl. 312.

38. **Insurance**—Proof of Death.—Refusal by insurer to pay a benefit certificate on the ground that insured became engaged in aviation held not a waiver of defense that insured was still living.—Woodmen of the World v. Maynor, Ala., 89 So. 750.

39.——Reinstatement.—Where the insured had paid premiums due on the policy through a local secretary of a fraternal benefit society, she is not estopped by efforts toward reinstatement because of a misapprehension as to her standing.—Eminent Household of Columbian Woodmen v. Simmons, Ark., 234 S. W. 182.

40.——Representations.—Certain statements, consisting of questions and answers in an application for insurance, set out in the opinion, examined, and held to be representations, and not warranties; that, in order to establish a defense based on the alleged falsity of said statements, it is incumbent on the defendant to prove that said questions were asked and answered by assured as written in the application; that they were false in some respect material to the risk; that they were made by the assured knowingly with the intent to deceive; that the defendant relied upon said representations and was deceived by them to its injury.—Beeler v. Supreme Tribe of Ben Hur, Neb., 184 N. W. 917.

41. **Interest**—Claims Against Railroad.—Under G. L. 2008, a judgment against a trustee is a discharge from a subsequent demand by the principal defendant, and if the claim is of the nature that the principal defendant could demand interest, at the time of service of the trustee process, the running of interest is not interrupted by such service.—Northfield Trust Co. v. Cutting, Vt., 115 Atl. 289.

42. **Intoxicating Liquors**—Information for Manufacturing.—An information for manufacturing intoxicating liquor need not allege that the intoxicating liquor manufactured was not denatured alcohol, for the exception in Const. art. 23, § 1 of denatured alcohol is separable; it being a poison rather than an intoxicant.—Richardson v. State, Ariz., 201 Pac. 845.

43.——"Sale" Includes Loan.—In a prosecution for the unlawful sale of spirituous liquors, it was not error to exclude evidence as to whether the liquor was paid for, since a sale on credit, or a loan of liquor, to be returned, comes within the statute.—State v. Lemons, N. C., 109 S. E. 27.

44. **Landlord and Tenant**—Rent as Wages.—Where plaintiff cultivated defendant's land for a share of the crop, which was to belong to defendant until divided, occupation of a house on the land by permission did not create the relation of landlord and tenant, but of landlord and laborer, and, on being discharged by defendant, plaintiff's rights in the premises were extinguished.—Woodson v. McLaughlin, Ark., 234 S. W. 185.

45.——Title.—A tenant is not allowed to dispute the title of his landlord without first surrendering possession; and while in possession he may not collude with another, who claims to hold an adverse or hostile title, and thus prejudice the right of possession of his landlord.—Board of Education v. Dunkley, W. Va., 109 S. E. 247.

46. **Master and Servant**—Agent of Coal Dealer.—Waters v. Pioneer Fuel Co., 52 Minn. 474, 55 N. W. 52, 38 Am. St. Rep. 564, to the effect that a person temporarily employed by a coal dealer to haul and deliver by means of his own conveyance and facilities coal and fuel to a patron of the dealer at a stipulated rate per ton or load is, for the time being, the agent and servant of the dealer, and not an independent contractor, followed and applied.—Dunn v. Reeves Coal Yards Co., Minn., 184 N. W. 1027.

47. **Mines and Minerals**—Oil Lease.—An oil lease for two years requiring lessee to drill a well the first year or pay rentals for each additional year thereafter was not unilateral as to the second year on the ground lessee need not pay rental for such year, lessee, not having drilled the well within the first year, being bound to pay rentals for the remaining year unless lessor sooner terminated the lease by giving notice in the manner required.—Turner v. Lick Creek Oil & Gas Co., Ky., 234 S. W. 191.

48. **Monopolies**—Automobile Transportation Law.—Laws 1919 c. 130, regulating automobile transportation, held not special or partial legislation under Const. art. 2, § 13, art. 4, pt. 2, § 19; for the fact that, in granting the certificate of convenience and necessity for a stage route provided for in the act, the Corporation Commission may be obliged to select between two or more applicants, does not invalidate the law as monopolistic class, discriminatory, or partial legislation.—Haddad v. State, Ariz., 201 Pac. 847.

49.——Violation of State Law.—Neither the Clayton Anti-Trust Act of Oct., 1914, the act of March 21, 1918, providing for the federal control of railroads, nor the federal Transportation Act of Feb. 28, 1920 interferes with the power of the state to punish railroad corporations for violations of its laws committed by such corporations prior to the enactment of the said federal statutes.—State v Southern Ry. Co., Miss., 89 So. 769.

50. **Mortgages**—Extension of Time.—Where purchasers of land, mortgaged to secure a note of the original obligor, assumed the note and were accepted as obligors by the owner of the note, the verbal agreement of the owner of the note to extend the time of payment, followed by a written agreement between the owner and the new obligors, extending time of payment and specifying that no parties liable should be released by the extension, but which was without the consent of the original obligor, who had become a surety, released the surety.—Maier v. Thorman, Tex., 234 S. W. 239.

51. **Municipal Corporations**—Use of Streets.—A city, though empowered under Transportation Corporations Law, § 26, to regulate the use of streets by persons and vehicles, and to grant franchises or rights to use the streets, cannot deny its consent to operation of a bus line to applicant, who is willing to abide by the rules and regulations prescribed by the city for the use of its streets, on the ground that the bus line is not a public necessity, and is not for the

best interests of the city or its citizens; the power to deny use of the streets to a person being exclusively in the Public Service Commission.—People v. Leonard, N. Y., 190 N. Y. S. 400.

52. **Negligence**—Injury by Fixture.—In an action against a grocery company for injuries to a customer by defective floor, it is no defense that the depression in the floor was a fixture, which under the terms of its lease the company could not remove, since, having invited public into its store, it was required to provide a reasonably safe place for the public, even though building was owned by another.—Hill Grocery Co. v. Hameker, Ala., 89 So. 850.

53. **Parent and Child**—"Willful Neglect."—The failure of the husband to furnish his wife money for the maintenance of a two months old infant born in the home of her parents, after she had left the matrimonial domicile without cause and contrary to his wishes, is not in itself willful neglect or refusal to provide for such child within the meaning of section 8614, Rev. St. 1913.—Preston v. State, Neb., 184 N. W. 925.

54. **Railroads**—Crossing.—In an action for killing of a mare at a public crossing, an admission by the engineer that he did not sound the signals by bell and whistle, as provided in Ky. St. § 786, to be given on the approach to public crossings, amounts to a confession of negligence.—Chesapeake & O. Ry. Co. v. Turley, Ky., 234 S. W. 188.

55.——Killing of Animals.—Railroads are liable for the negligent killing of stock, and under the statutes a presumption of negligence arises when the killing is established; but such presumption may be overcome by the testimony of an engineer or a fireman, or both, when such testimony is consistent, reasonable, and uncontradicted in essential points to the effect that the killing was not due to any negligence on the part of the railroad company or its employees.—Kansas City Southern Ry. Co. v. Dyer, Ark., 234 S. W. 50.

56.——Ordinary Care.—Where officers of a mining company knowingly acquiesce in a custom of its employees in carrying passengers gratuitously on a car operated only for the purpose of carrying express and mail on its railway between the mine and a railroad station, the company owes to the passengers the duty of using ordinary care for their safety.—Wolford v. Majestic Colleries Co., Ky., 234 S. W. 204.

57. **Sales**—Breach of Warranty.—Where property is sold, or contracted to be sold, to a vendee, who agrees to keep and pay for the same on condition that it works satisfactorily, the buyer, relying upon such condition, must be honestly dissatisfied with the property in refusing to accept the goods.—Olson v. Larson, N. D, 184 N. W. 984.

58.——Breach of Warranty.—Under Sale of Goods Act, § 49, providing that the buyer's acceptance of goods shall not discharge the seller from liability for breach of warranty unless the buyer fails to notify the seller thereof within a reasonable time evidence that building material sold furnished the buyer was inferior, and not, as ordered, was properly rejected in the absence of proof of such notice.—Bass v. Bellofatto, N. J., 115 Atl. 302.

59.——Burden of Delivery.—The buyer of goods to be shipped to him by the seller is not bound by a printed memorandum at the top of the invoice forwarded to him by the seller that the seller assumes no responsibility for the goods after he delivers them to the carrier for transportation to the buyer in the absence of evidence that such memorandum has been brought to the buyer's attention.—Evans-Terry Co. v. Liberty Mills, Miss., 89 So. 809.

60.——Delivery.—Where automobile was sold under conditional contract, and defendant defaulted in payments, and plaintiff's attorney called on defendant and stated that he must either have payment of the notes or have the car mere refusal of defendant to pay the notes, without reference to the car, did not constitute a refusal to surrender possession of it, on which an action in replevin could be based.—Grow v. Washburn, Vt., 115 Atl. 226.

61.——Warranty.—A warranty that cattle were "good and merchantable" was no more than a warranty that they were "sound," which simply means that they are free from disease, and not that they are ticky and thus immune from tick fever.—Raney & Hamon v. Hamilton & White, Tex., 234 S. W. 229.

62. **Specific Performance**—Meeting of Minds.—In a contract of sale of a building, "subject to first mortgage now incumbering the property held by the C. B. & L. Association in the sum of $36,000," the minds of the parties never met, where the mortgage referred to was an installment mortgage secured by 180 shares of building and loan association stock, one-half paid up pledged as collateral, and specific performance could not be decreed, since court could not direct purchasers to pay $1,800 and take an assignment of such shares.—Street v. Harris, N. J., 115 Atl. 209.

63. **Street Railroads**—Last Clear Chance.—A street railroad company owes a duty to a traveler on the street to keep watch and use all reasonable care to avoid injuring him, and where the performance of that duty would have resulted in the discovery of a truck driver's position in time to have avoided collision by the exercise of ordinary care, unless the driver's negligence in stopping too near the track actively continued up to the moment of accident, the doctrine of last clear chance may be properly invoked.—Dyer v. Cumberland County Power & Light Co., Me., 115 Atl. 194.

64. **Taxation**—Mistake in Name.—The requirement that a tax assessment be made against the person liable, and in his name, is for his protection, and when a taxpayer is not deceived nor misled, and has paid a tax assessed on the same property for seven years, without objection or complaint that it was not properly assessed against him, a mistake in the name does not render the assessment void.—Town of Orange v. City of Barre, Vt., 115 Atl. 238.

65. **Wills**—Fee Simple Estate.—A will giving land to a daughter of testatrix, and giving her all the household goods of the testatrix during her life time, with power to dispose thereof if left a widow or separated from her husband, and also giving her the residuary estate, gave her a fee-simple estate in all the property, both real and personal, and a further provision that if her husband outlived her he should have the use of the farm and household goods during his lifetime or his occupancy of the farm, and that at his death or vacation of the farm the property should be divided between the daughter's children, or, if none were living, her nearest heirs, was null and void.—Webb v. Dow, Me., 115 Atl. 279.

66.——Gift of Trustee.—The interest of the trustee in a suit to have declared void a clause of a will adding to the principal of the trust theretofore created by testator is the same as the beneficiaries', except one whom testator attempted to strike out as a beneficiary under the trust, so that, the trustee being a defendant, the beneficiaries other than the one attempted to be stricken are not indispensable, though proper, parties; but such one must be made a party.—Atwood v. Rhode Island Hospital Trust Co., U. S. C. C. A., 275 Fed. 513.

67.——Rule in Shelley's Case.—In order that the rule in Shelley's Case may apply, the words "heirs" or "heirs of the body" must be taken in their technical sense, carrying the estate to the entire line of heirs, to hold as inheritors under the canons of descent, and, if it appears by correct construction that these words are not used in that sense, but only as words designating certain persons or a restricted class of heirs, the rule does not apply.—Reid v. Neal, N. C., 108 S. E. 769.

68.——Unlawful Accumulations.—Where a will bequeathed an annual income of $10,000 to a daughter and $3,000 annually to another, the remainder of the net income to be applied to the use of the daughter during her life, "accumulating for her benefit during minority and adding to the principal of the trust fund so much of the sum as may not be required for her education and support, in addition to the $10,000," the accumulation from the net income being unlawful and the direction concerning same void, it belongs to the daughter absolutely as the person entitled to the next eventual estate.—In re Trowbridge's Estate, N. Y., 190 N. Y. S. 492.